United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7314

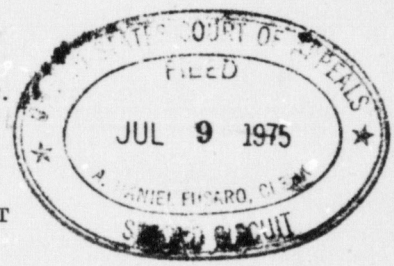
United States Court of Appeals

FOR THE SECOND CIRCUIT

MICHAEL JUDGE,
Plaintiff-Appellant,

v.

CITY OF BUFFALO,
Defendant-Appellee.



APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
CIVIL ACTION NO. 1973-307.

BRIEF OF PLAINTIFF-APPELLANT

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BATAVIA TIMES, APPELLATE COURT PRINTERS
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2. Whether the papers before the court below on motion for summary judgment entitled the City of Buffalo to judgment as a matter of law.

3. Whether plaintiff,a white male,was entitled to the benefit of Guidelines of U.S.Department of Justice prohibiting denial of an appointment because of height.

STATEMENT OF THE CASE

A

NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This is an action by a Community Peace Officer of the City of Buffalo under a program funded by the Law Enforcement Assistance Administration of the U. S. Department of Justice. ((Hereafter referred to as L.E.A.A.)). That program provided for automatic promotion to policeman after one year as Community Peace Officer upon the passing of a second physical examination. The City of Buffalo was obligated to abide by guidelines issued from time to time by L.E.A.A.

The City of Buffalo had a minimum height for policeman of 5 foot 9 inches. Plaintiff was that height when he was accepted as a Community Peace Officer. Before the time came for his appointment to be a policeman he was hit by a car crossing a street sustaining fractures of both legs which reduced his height to 5 foot 7 inches. When he took his second physical examination he was denied appointment upon the stated reason at that time that he was not tall enough. Shortly thereafter the Guidelines prohibiting discrimination based on height were issued and this action based thereupon was begun.

The City of Buffalo moved to dismiss the complaint under Rule 12 upon the ground of lack of subject matter jurisdiction. The court below/converted the motion into one for summary judgment and ordered further affidavits to be filed ((App.15)) Thereafter, upon consideration of the further affidavits and related material it granted summary judgment to the City of Buffalo.

Hon John T Curtin U.S.D.J.

B

STATEMENT OF FACTS

The City of Buffalo entered into a lengthy contract with the State of New York providing for a grant award of $674,617 to the City of Buffalo from funds provided to the State of New York by L.E.A.A.pursuant to the Omnibus Crime Control and Safe Streets Act of 1968,82 Stat 197.(Ex 1 annexed to affidavit of Anthony Manguso,App. 9 but not itself separately printed in Appendix). Paragraph 24b thereof obligated City of Buffalo to abide by regulations issued by the U.S. Department of Justice. The Complaint alleges,App 3 and the Answer admits,App 6 that the funds for the program were received by the City of Buffalo from L.E.A.A. This judicial admission plainly binds the City of Buffalo in this action despite the affidavit of Anthony Manguso that the funds were received from State of New York.(App. 9). Par. 24b in any event bound the City of Buffalo,grantee,to abide by said regulations.

Upon execution of the contract the City of Buffalo issued its announcement of Civil Service examinations to fill 50 available positions under the program. The announcement is printed at App. 68-9/ That announcement provided among other things:

> "SUBJECT OF EXAMINATION: Written examination
> Physical agility test
>
> Candidates must participate in the written and physical agility test and receive an <u>average</u> score of 70% to be on the eligible list."

Plaintiff was one of the 50 successful candidates. He was appointed a Community Peace Officer on December 14, 1971. (Par 1 of complaint, App. 3, admitted by par. 1 of Answer, App. 6) On February 27, 1972 plaintiff sustained fractures of both legs. (App. 21.) He was off work until August 24, 1972 when he returned to work. (Aff. of Wm Cleary, App. 29).

On January 24, 1973 together with the rest of his class plaintiff underwent a physical examination preliminary to his permanent appointment as a policeman (Aff. of Michael Judge, App. 51.). At that physical examination the doctor saw his leg and asked plaintiff what happened. Plaintiff told him he had been in an auto accident and had broken both legs. The Doctor asked how they were, plaintiff answered good. The Doctor then brushed his hand upon it and said "it looks good". The examining physician noted the legs to be normal. (App 34) Plaintiff was told to stretch a lot by the "guy who had checked his height." Plaintiff went back two times more within the next two weeks for the sole purpose of checking his height.(App.52)

On January 31, 1973 the Civil Service Commission adopted a resolution denying certification of appointment to patrolman for the reason that he did not fulfill the height requirement (App. 53). On February 6, 1973 the Administrative Director of the Civil Service Commission officially notified plaintiff of his ineligibility for patrolman due to non attainment of the height standard and for no other stated reason. (App. 33).

On March 9, 1973 L.E.A.A. promulgated by publication in Federal Register equal rights guidelines. Judicial notice thereof was taken below (App. 82). A true copy is annexed hereto. The pertinent operative section thereof is:

> "4. Requirement. The use of minimum height requirements, which disqualifies disproportionately women and persons of certain national origins and races, such as persons of Mexican and Puerto Rican ancestry, or oriental descent, will be considered violative to this Department's regulations prohibiting employment discrimination."

Given the obligation of the City of Buffalo to obey the guidelines of the Department of Justice the normalcy of all items including legs on the physical examination, other than height, the obligation of the City of Buffalo then and there to obey the Guideline and appoint the plaintiff would seem to have then and there accrued.

Instead, on May 23, 1973 it wrote to the attorney who had handled his accident case the letter printed at App. 24 reading in pertinent part:

> "
>
> Re: Michael D. Judge
> D/A 2/29/27
>
> ...he is tenatively eligible for appointment as a patrolman and at the time of his preliminary medical screening examination, Mr. Judge failed to meet the height requirement of 5 ft 9 in. At that time Mr. Judge related an incident that occurred on the above captioned date at which time he sustained severe and compound fractures of both limbs."

The records were provided to the City's examining physician and the same are printed at App 21-27. Based upon those records alone, he then wrote the REJECT language appearing on the bottom of the medical report of his examination of the plaintiff on January 24, 1973. No physicial examination was given to Michael Judge by Dr. Birchette to show the then present state of recovery from such injuries. This is shown (1) by the absence of any such statement that he did in the affidavit of Dr. Birchette (App 18) and the denial contained in the affidavit of Michael Judge at App 53:

> "Dr. Birchette never gave me a later physical examination than the one he gave me on January 24, 1973"

Although the most recent of the record relied upon by Dr. Birchette, in making the hereafter quoted opinion from his affidavit, was that of Mr. Judge's doctor dated August 29, 1972, more than nine months before and which stated in pertinent part at App 27":

> "The patient may have a mild to moderate permanent disability although it is impossible to say at this early date if there will be any and how much there will be in the way of permanent disability" ,

the reason given for the rejection is stated in Dr. Birchette's affidavit (App 18):

> "Based upon my evaluation of these reports, I recommended to the Commission on or about June 1, 1973 that the plaintiff be rejected as a condidate for the position of Patrolman because of the nature of the injuries which he had sustained in his automobile accident of February 27, 1972."

From a doctor who, following disclosure from the candidate that he had sustained two broken legs and who had marked the legs as normal on his contemporaneous report, to conclude from the records alone without reexamination of the candidate that he must be rejected because of broken legs alone without consideration of the nature and extent of recovery, seems to be a frail basis upon which to render summary judgment.

Immediately after the instant action was begun the Civil Service Commission arranged to have plaintiff examined by a physician of their choice, Dr. Stephen Joyce, an orthopedic surgeon (App. 64).It directed the plaintiff "to submit to a disinterested orthopedic surgeon to evaluate his disability and his physical condition as it relates to the performance of the duties of a patrolman." (Minutes of meeting of Board of 6/27/73, App 38).

The examination was had and Dr. Joyce rendered his opinion (App 61-3) ending with the conclusion that:

> "I do not think this would interfere with his performance as a peace officer."

Thereafter the Civil Service Commission sent Dr. Joyce a further letter dated July 19, 1973 admonishing him that the job of patrolman was one demanding great physical endurance which must be based on a lifetime of service and requesting his medical prognosis whether he felt Mr. Judge was capable to discharging those duties now and over the next 20 years (App 59-60)

On September 9,1973 Dr Joyce sent his final report printed at App. 58,concluding:

> "Because none of these fractures extended into the joints, I would think the subsequent involvement of Degenerative Arthritis is minimal-if at all. It is because of this-and after again looking over your criteria,-that I do not feel the injuries this man sustained would interfere with the proper performance of his duties."

The Civil Service Commission not content with the report of its own expert demanded that plaintiff, alone of all the candidates, retake another 1/2 of the Civil Service examination, namely the agility test (App 31) The court below gave decisive weight to the fact that plaintiff scored 64. thereupon (Decision, App 82).

In his answering affidavit, at App 55-6 plaintiff pointed out that he is a grain scooper and described the duties of a grain scooper and the demands that it put upon the legs and his ability to do the work successfully. In this he is supported by the affidavit of his grain scooping boss, App 50, who concluded:

> "Knowing what I know about how essential strong legs are to a scooper one thing I am sure of and that is that Michael Judge's legs are strong."

POINT I

SUMMARY JUDGMENT REQUIRES THE SAME QUANTUM OF PROOF AS A DIRECTED VERDICT AND DEFENDANT DID NOT MEET THAT BURDEN

Defendant was granted summary judgment pursuant to Federal Rule of Civil Procedure 56. The pertinent part of that rule is:

> "(c)...The judgment sought shall be rendered forthwith if the pleadings,depositions,answers to interrogatories,and admissions on file,together with the affidavits,if any,show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Judgment as a matter of law means that the moving party must be entitled on the same evidence to a directed verdict. This was so held by the U.S.Supreme Court in Sartor v. Arkansas Natural Gas Corp 321 U.S.620,88 L.Ed 967,64 S.Ct.724,squarely and to the same effect in Poller v. Columbia Broadcasting System,Inc 368 U.S.464,7 L.Ed.2d 458,82 S. Ct. 486.

In Sartor v. Arkansas Natural Gas Corp supra it was held:

> "A summary disposition of issues of damages should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party." 321 U.S.at 623.

In Poller v. Columbia Broadcasting System,Inc supra the court to similar effect at 368 U.S.473:

> "It may be that upon all the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is.' Certainly there is no conclusive evidence supporting the respondent's theory.We look at the record on summary judgment in the light most favorable to Poller,the party opposing the motion,and conclude here that it should not have been granted."

This court has consistently held to identical effect with the U.S.Supreme Court and Rule 56:

Doehler Metal Furniture Co v. U.S.149 F.2d 130,135(C.A.2,1945)
Arnstein v. Porter 154 F.2d 464,470-1(C.A.2,1946)
Colby v. Klune 178 F.2d 872,873,4 (C.A.2,1949)

In Doehler Metal Furniture Co v. U.S. supra this court held at 135:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts,and a denial of that right is reviewable."

In Arnstein v. Porter supra this court held,citing and following Sartor v. Arkansas Natural Gas 321 U.S.620,624 above cited :

> "We cannot now say-as we think we must say to sustain a summary judgment-that at the close of a trial the judge could properly direct a verdict."

In Colby v. Klune 178 F.2d 872 at 874 this court held that the rule of Arnstein v. Porter is the same whether the case be one for jury trial or non jury trial,the court holding:

> " Nor is the situation different because the trial will be before a trial judge without a jury."

Summarizing the foregoing U.S.Supreme Court,Second Circuit and other cases and the text of Rule 56 itself,a recognized authority on Federal Practice, 6 Moore's Federal Practice 2043 states the law to be:

> " But functionally the theory underlying a motion for summary judgment is essentially the same as the theory underlying a motion for directed verdict.The crux of both theories is that there is no genuine issue of material fact to be determined by the trier of the facts,and that on the law applicable to the

established facts the movant is entitled to judgment," citing as its authority for that proposition Sartor v. Arkansas Natural Gas Co supra.

The author further states upon the authority of Firemen's Mutual Ins Co v. Aponaug Manufacturing Co 149 F.2d 359 (C.A.5,1945) at page 2044:

> "Following the directed verdict theory,a court should not grant summary judgment where it could not properly direct a verdict although it might properly set a verdict aside as against the weight of the evidence."

As an obvious corrollary to the directed verdict analogy the court on motion for summary judgment it was held in United States v. Diebold,Incorporated 369 U.S.654,8 L.Ed.2d 176, 82 S.Ct. 993(1962):

> "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."

Followed by this Court in Cali v. Eastern Airlines,Inc 442 F.2d 65,71 (1971) where this Court held:

> "Moreover,when the court grants summary judgment, it must resolve all ambiguities and draw all reasonable inferences favorable to the party against whom summary judgment is sought,United States v. Diebold 369 U.S.654,655,82 S.Ct.993,8 L.Ed.2d 176 (1962),bearing in mind that the moving party has the burden of showing an absence of any material factual issue for trial,Adickes v. Kress & Co 398 U.S.144,157,90 S.Ct.1598,26 L.Ed.2d 142 (1970). If undisputed evidentiary facts disclose competing material inferences as to which reasonable minds might disagree,the motion must be denied."

The court below fell into error,it is most respectfully submitted,because it did not apply the foregoing settled legal propositions. The bases for the court's decision to grant summary judgment will now be set forth seriatim together with a separate discussion of the respects in which they fail to follow the foregoing settled legal principles.

> (A)"On January 24,1973 when plaintiff was examined for the position of patrolman by the Commission's physician he failed to disclose that he had been involved in an automobile accident and that he had undergone the injuries to his legs and the subsequent operation." App. 79

The foregoing statement is refuted by the following two items in the record that the court below upon motion for summary judgment was bound to accept as the fact:

(1) The statement of Michael Judge in his affidavit at App.51:

> "In addition to the above the doctor saw my leg and asked me what had happened. I told him that I had been in an auto accident and had broken both my legs."

(2) The records of the Civil Service Commission itself in its letter to Mr Judge's accident lawyer,App. 74:

> "At that time((of his preliminary medical screening examination))Mr Judge related an incident that occurred on the above captioned date((D/A 2/29/72)) at which time he sustained severe and compound fractures of both limbs."

Under the foregoing legal authorities it was clear error for the court below to accept the version of the incident in Dr Birchette's affidavit which was in contravention of the Civil Service Commission's own records and the affidavit of Michael Judge as to the same incident.

(B) " His argument that defendant's refusal to certify him for appointment as patrolman was based upon his failure to meet the height requirement of five feet nine inches is not supported by any of the documents." App. 81

The foregoing basis of decision is refuted by the following documents in the record:

(1) The minutes of the Civil Service Commission of January 31,1973 quoted in the answering affidavit of Michael Judge at App. 53:

> "After a review of the medical report,the commission noted that Mr Judge does not meet the height requirement for this position.The Commission directed the Administrative Director to notify Mr Judge that his name will be deferred for certification until he has been reached for patrolman at which time if he does not meet the height requirement his name will not be certified as eligible for appointment to patrolman and his employment as a C.P.O. will be terminated."

(2) The letter to Mr Judge from the Administrative Director of the Civil Service Commission at App.33 actually relied upon by the City of Buffalo itself,attached as it is to Mr Cleary's own affidavit in support of the motion for summary judgment:

> "The Commission noted that in your final medical for this position you do not meet the height requirement.The Commission directed that your name be deferred for certification for the position of patrolman until you are reached for appointment to this position,at which time, if you do not meet the height requirement,your name will not be certified as eligible for appointment to Patrolman and your appointment as a Community Peace Officer must be terminated."

(3) The report of the physical examination itself as it existed on the date the two foregoing documents were compiled. No other deficiency than height appears. No other deficiency is alluded to in either of the two foregoing documents.Height and height alone was the basis for decision.

(4) The statement in the Judge affidavit at App. 52,which the court below was obligated to credit, that immediately after the physical examination he was told

> "to stretch a lot and we'll check it again in a couple days."

and Mr Judge's statement that

> "The Commission made an appointment for me to come back about a week later and I did.All they did then was check my height. I went back about a week later and again all they did was check my height."

The foregoing constitute documentary evidence that the refusal of the Civil Service Commission to certify him for appointment was due to the height requirement. Indeed it is more than evidence merely tending to support the inference,It is conclusive evidence of the motive. There is no better evidence than an opposing party's own records,contemporary records,made at a time when there is no motive to be incorrect. At the time the records were compiled,in the absence of any Federal Guidelines,height was a legitimate basis for discrimination. It no longer was after March 9,1973 when the Guidelines were published in the Federal Register.

(C) "Because the evidence in this case clearly indicates that the City's refusal to name the plaintiff to the position of police officer was based upon his failure to pass the agility test as part of the medical examination, the court will not pass upon plaintiff's argument that Guidelines unconstitutionally discriminate against plaintiff."

The core of the court's error in the foregoing determination is its belief that the agility test was part of the medical examination. The evidence before it was exactly to the contrary. The agility test was part of the civil service examination itself. This statement is supported by the following documents in the record:

(1) The Civil Service announcement of examination, (App.68) to such effect

(2) The admission of the Civil Service Administrator, to such effect embodied in the affirmation of Francis X. Murphy (App. 72)

(3) The Civil Service's own record of the results of Mr Judge's initial agility examination printed at App.70 which shows a factor of 40% to the agility test results.

(4) The statement embodied in Mr Judge's affidavit at App.54 of an admission made to him by the Civil Service Commission

"In the literature describing the requirement for the position of Community Peace Officer a total score of 70% was required to pass.The written test was weighted at 60% of the total and the agility test was weighted at 40% of the total. On September 4,1974 I confirmed by telephone call to the Civil Service Commission that this was so and that this is still so."

Establishment of immediately foregoing statement 1 is demonstrated by the language of the announcement itself at App 68:

> "Subject of Examination: Written examination
> Physical Agility Test
>
> Candidates must participate in the written and physical agility test and receive an average score of 70% to be on the eligible list"

As a wholly separate item is the requirement in addition to age, education, height, residence and subject of examination:

"Medical-Physical Requirements: Refer to attached sheet"

To reach the conclusion, logically, that the word "average" means an average of the several components of the agility test and that the candidate must pass both an agility test and a written examination with a core of 70% the court would have to read into the language of the announcement the words "in each". This the court can not do within the authorities heretofore cited particularly Cali v. Eastern Airlines, Inc 442 F.2d 65,71(C.A.2,1971)

> "it must resolve all ambiguities and draw all reasonable inferences favorable to the party against whom summary judgment is sought."

United States v. Diebold Incorporated 369 U.S.654,8 L.Ed.2d 176, 82 S.Ct. 993 (1962):

> "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."

In fact the Civil Service documents are not even ambiguous when read as a whole. The summary of Mr Judge's agility test results shows a total of 289 of a possible 400 or 72.25%, placed in the column marked "Factor .1 = 40%." If it were necessary to pass both an agility test and a written examination with a mark of 70% there would be no occasion or necessity for having the agility test have a factor of 40%. If ambiguity there still be, and it is difficult to see one when viewing the announcement and the Civil Service records as a unit, it had to be resolved below in favor of the plaintiff.

Any doubt there might remain as to the foregoing conclusion was resolved by the admission of William Cleary to Francis X. Murphy reported at App 72:

> " Mr Cleary confirmed that the examination for C.P.O. was in two parts, a written examination and an agility test and the mark was the average of these two tests. I asked him how the candidate would know the weight to be attached to each test and he stated that where no weights are stated it is understood that they are equally weighted and that the mark is the arithmetic average of the two tests."

The court's basic conclusion that plaintiff could not possible prevail upon trial because some 5 months after the filing of the complaint he allegedly failed to repass an agility test is incorrect for several stated reasons as follows:

(1) When the complaint was filed the sole reason for non appointment, at least as shown by the contemporaneous records, was height and not physical qualifications. If at that moment the City of Buffalo was motivated by his being only 5 foot 7 inches

there was at that instant a violation of the Federal Guidelines. Motivation is not established by pious disclaimers of evil intent but by hard evidence at an adversary trial where the disclaimers of evil intent are subjected to rigid cross examination. Several of the authorities heretofore cited state that where motive is at issue it is improper to grant summary judgment. This court so held in Cali v. Eastern Airlines,Inc 442 F.2d 65,71(C.A.2,1971) citing with approval the following holding from Empire Electronics Co v. United States 311 F.2d at 179-80:

> " ' This admonition should especially be kept in mind when the inferences which the parties seek to have drawn deal with questions of motive,intent,and subjective feelings and reactions.' "

For the same proposition this court cited and followed Poller v. Columbia System 368 U.S.464,473,7 L.ed 2d 458,464,82 S.Ct 486 at 442 F. 2d at 71 and rightly so:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators,and hostile witnesses thicken the plot."

While the case at bar is not an antitrust case,neither was Cali v. Eastern Airlines,Inc supra. The City's motive and intent is very definitely at issue. The City of Buffalo's financial distress are matters of public record,City of Buffalo v. Hurd 34 N.Y.2d 628(1974) City of Buffalo could not impose tax rate in excess of the 2% limit of the State Constitution

2. The passing of an agility test was not a sine qua non to an appointment but merely one half of a civil service examination. Having passed the civil service examination it remained only to pass a satisfactory physical examination and the records of Dr. Joyce adverted to in the statement of facts established that he passed a satisfactory physical examination,at least for the purpose of raising an issue of fact in that regard.

3. Dr Birchette's affidavit is that of an interested party,is inconsistent with his prior examination,was made without benefit of a reexamination of the plaintiff in the light of the records,was made on the basis of records 10 months old not purporting to represent present condition.

4. The court below failed to give effect to the rule that on summary judgment the only issue is whether Mr Judge's proof if believed by a jury or other factfinder would be sufficient to withstand a motion for a directed verdict. The real issue was whether Mr Judge's legs were strong. The court below ignored both lay evidence,the affidavit of both Mr Judge,App 51 et seq and that of his scooper boss,Mr Donsbach,App. 50,which he was required to accept as proven facts for the purpose of the motion.

5. The uncritical acceptance of the records of the second agility test,which were neither certified to nor proven by the affidavit of the person who had administered the test, in contravention to Rule 56e which provides:

> "Supporting and opposing affidavits shall be made on personal knowledge,shall set forth such facts as would be admissible in evidence,and shall show that the affiant is competent to testify to the matters stated therein.

The record of the second agility test annexed to the affidavit of Mr. Cleary, administrative director of the Civil Service system do not meet this test. They are pure hearsay. The reputed results of a test given Mr. Judge. Under the foregoing quoted subsection the court below ought not to have taken them into account.

Mr. Cleary in his affidavit does not purport to have witnessed the second agility test. The record was incompetent without the supporting affidavit of the person or persons who administered the test. Without their affidavit the records would not have been received in evidence.

Automatic Radio Mfg Co v Hazeltine Research 339 U.S. 827, 831

U.S. v Dibble 429 F.2d 598 (C.A. 9, 1970)

F. S. Bowen Electric Co v J. D. Hedlin 316 F. 2d 362, 364-5

The motion for summary judgment ought to have been denied for failure of defendant's papers on the motion to meet the test of sufficiency to direct a verdict in its favor.

POINT II

PLAINTIFF WAS WITHIN THE ZONE OF INTERESTS WHICH THE GUIDELINES WERE DESIGNED TO PROTECT AND HAD A LEGAL RIGHT TO THEIR APPLICATION TO HIM

The alternative basis for the decision below is stated in the Decision at App. 82:

> "Further,the plaintiff is a white male.He has not placed himself within the zone of interests which the statutes and guidelines are designed to protect. Because there is clearly no violation of plaintiff's civil rights,there is no federal jurisdiction. Oklahoma High School Athletic Association v. Bray 321 F.2d 269(10th Cir.1963);Data Processing Service Corp v. Camp 397 U.S.150 (1970)

The citation of Data Processing Service Corp v. Camp supra for this proposition is puzzling. It appears to hold just the opposite. The question there involved was whether a competitor of a national bank in the provision of data processing services to a bank's customers had standing to challenge a ruling of the Respondent,Comptroller of the Currency,that national banks had that power incident to their banking services. The holding was that it had such standing. There is no question of standing in the case at bar. Plaintiff stands to win or lose his lawsuit by the construction and interpretation of guidelines of the department of justice.

It would certainly appear that Mr Judge,an employee of the city of Buffalo whose salary was being paid for by the Department of Justice,whose rules and regulations the City of Buffalo agreed to abide,has more standing than did a corporation that was not even a bank,much less a national bank,to challenge

adherence to those rules and regulations by the city of Buffalo.

Although the guideline,prohibiting height as a basis for denial of a job by recipients of L.E.A.A.money doubtless had as their purpose, assistance to women,orientals,Mexicans and Puerto Ricans the Guidelines do not by their terms limit themselves to those races. The operative section of the Guideline reads:

> "4. Requirement: The use of minimum height requirements, which disqualifies disproportionately women and persons of certain national origins and races such as persons of Mexican and Puerto Rican ancestry or oriental descent,will be consideredviolative to this Department's regulations prohibiting employment discrimination."

Mexican and Puerto Ricans,the court may judicially notice,are white persons. The regulation does not limit itself to those two nationalities. It does not appear in the record what was the national origin of Mr Judge or whether that national origin was one which intrinsically short. Consequently,on this narrow basis alone,summary judgment was precluded under the authorities cited heretofore. It was not Mr Judge's burden below to perfect the record that the applicant for summary judgment had to make.

More fundamentally,the Guideline does not limit its protection to the enumerated persons or races that were merely illustrative. The occasion for the adoption of the guideline was the effect of height standards on job opportunities with recipients of L.E.A.A.funds but it is not limited to them. The operative language is: "The use of minimum height requirements... will be considered violative of this Department's regulations prohibiting employment discrimination.

The City of Buffalo,<u>perhaps</u>, could have limited the

Community Peace Officer program to negroes. Attachment A to the Grant Award affixed to the affidavit of Mr Manguso recites that only 1.7 percent of its police force was of minority extraction compared with a black population of 22%. But it did not do so. Instead following the the advertising program specified in paragraph 1 of Attachment A it developed a neighborhood oriented campaign resulting in selection of both white and negro races. Once white men were selected they became entitled to the Rules and Regulations protection of Federal Guidelines for the program promulgated from time to time.

This is an appropriate opportunity for this court to lay to rest once and for all the constitutional fallacy that has become current that the equal protection clause operates for the benefit only of women and certain minority races. The concept that women and minority races are entitled to all of the legal rights of white, Anglo Saxon males and in addition are entitled to certain rights that are denied to white Anglo Saxon males.

It was settled as long ago as Buchanan v. Warley 245 U.S.60,62 L.Ed 149(1917) and reafirrmed as recently as Monroe v. Pape 365 U.S.167,5 L.Ed.2d 492,81 S.Ct. 473(1961) that the equal protection clause of the 14th amendment applies to white persons equally with colored persons.

In Buchanan v. Warley a white man made a contract to sell land for a home to a colored man in a neighborhood predominantly white. The negro sought to avoid specific performance of the contract on the basis that a state statute prohibited his building a home on the land and the white man made the con-

tention that the statute was in violation of the 14th Amendment and void. At the threshold Mr Justice Day disposed of the negro's argument that:

> "the alleged denial of constitutional rights involves only the rights of colored persons,and that the plaintiff in error is a white person."

with the observation that

> "The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property and had obligated himself to take it. 245 U.S.at 72-3

and noting at 245 U.S.76 that

> "While a principal purpose of the latter((the 14th)) amendment was to protect persons of color,the broad language used was deemed sufficient to protect all persons,white or black,against discriminatory legislation by the states.This is now the settled law."

It quoted with approval from Strauder v. West Virginia 100 U.S. 303:after quoting the 14th amendment:

> "What is this but declaring that the law in the states shall be the same for the black as for the white-that all persons,whether colored or white, shall stand equal before the laws of the states...
>
> "The 14th Amendment makes no attempt to enumerate the rights it designs to protect.It speaks in general terms and those are as comprehensive as possible."

and held that the clause in the contract of sale that

> "It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residenceand it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the state of Kentucky and the city of Louisville,to occupy said property as a residence." 245 U.S.at 69-70

was no excuse for the negro to specifically perform because the statute and ordinance was unconstitutional.

The other case cited for eschewal of District Court jurisdiction was equally improper. OKLAHOMA HIGH SCHOOL v BRAY 321 F 2d 269 squarely held at P 273 that the District

Court had jurisdiction to decide the case.

In Monroe v. Pape 365 U.S.167,183;5 L.Ed.2d492,502-3, 81 S.Ct. 473 (1961),speaking to the point that the Civil Rights statutes enacted pursuant to the 14th Amendment applied only to the southern states and not to one as enlightened as Illinois Mr Justice Douglas for the Court stated:

> "Although the legislation was enacted because of the conditions that existed in the South at that time,it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates."

Finally,it is well recognized that the provisions in the Civil Rights Act of 1964 prohibiting sex discrimination 42 U.S.C.S. 2000e-2a were enacted for the specific purpose of prohibition of sexual discrimination against women. It has been uniformly held that males are entitled to the literal benefit of this statute enacted to protect females. Diaz v. Pan American WorldAirways 442 F.2d 385 is typical of such holdings. It was there held by the 5th Circuit that a male had an equal right to a stewardess job under this statute enacted for the benefit of women.

CONCLUSION

For the foregoing reasons the judgment appealed from should be reversed and the matter set down for trial.

Francis X. Murphy
Attorney for Plaintiff-Appellant
914 Abbott Road
Buffalo New York 14220

to or prevention of establishment of an industry in the United States.

Pursuant to section 201(b) of the Act (19 U.S.C. 160(b)), notice is hereby given that there are reasonable grounds to believe or suspect that the purchase price or exporter's sales price, as applicable (sections 203 and 204 of the Act; 19 U.S.C. 162 and 163), of steel wire rope from Japan is less, or likely to be less, than the foreign market value (section 205 of the Act; 19 U.S.C. 164).

Statement of Reasons. The investigation revealed that the proper basis of comparison for fair value purposes is between purchase price or exporter's sales price and the adjusted home market price of such or similar merchandise.

Purchase price was based on the f.o.b. Japanese port price with deductions for inland freight and other shipping charges, as applicable.

Exporter's sales price was calculated by deducting from the resale price of the related firm to the unrelated purchaser in the U.S. bank charges, transportation charges in the United States and Japan, ocean freight and insurance, selling commission, and U.S. duty.

The home market price was calculated on the basis of a weighted-average delivered price of such or similar merchandise with deductions for inland freight and other shipping charges, as applicable. Appropriate adjustments were made for differences in packing and credit costs.

Using the above criteria, there are reasonable grounds to believe or suspect that the purchase price or exporter's sales price, as appropriate, will be lower than the home market price.

Customs officers are being directed to withhold appraisement of steel wire rope from Japan in accordance with § 153.48, Customs Regulations (19 CFR 153.48).

In accordance with §§ 153.32(b) and 153.37, Customs Regulations, interested parties may present written views or arguments, or request in writing that the Secretary of the Treasury afford an opportunity to present oral views.

Any requests that the Secretary of the Treasury afford an opportunity to present oral views should be addressed to the Commissioner of Customs, 2100 K Street NW., Washington, DC 20229, in time to be received by his office on or before March 19, 1973. Such requests must be accompanied by a statement outlining the issues wished to be discussed.

Any written views or arguments should likewise be addressed to the Commissioner of Customs in time to be received by his office on or before April 9, 1973.

This notice, which is published pursuant to § 153.34(b), Customs Regulations (19 CFR 153.34(b)), shall become effective on March 9, 1973. It shall cease to be effective on September 10, 1973, unless previously revoked.

[SEAL] EDWARD L. MORGAN,
Assistant Secretary of the Treasury.

MARCH 6, 1973.

[FR Doc.73-4553 Filed 3-8-73;8:45 am]

DEPARTMENT OF DEFENSE

Department of the Army

HISTORICAL ADVISORY COMMITTEE

Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), announcement is made of the following Committee meeting:

Name: Department of the Army Historical Advisory Committee.

Date: April 6, 1973.

Place: Conference Room, Wing 2, Second Floor, Tempo C, Second and R Streets SW., Washington, DC.

Time: 1015-1130; 1345-1515.

Proposed agenda:

1020-1130 Review of historical activities.
1345-1515 Discussion of activities and executive session of the committee.

Purpose of meeting: The committee will review the past year's historical activities based on reports and manuscripts received throughout the year and formulate recommendation to the Secretary of the Army for advancing the purposes of the Army Historical Program.

Meeting of the Advisory Committee is open to the public. Public attendance depending on available space, may be limited to those persons who have notified the Advisory Committee Management Office in writing, at least 5 days prior to the meeting, of their intention to attend the April 6 meeting.

Any member of the public may file a written statement with the Committee before, during or after the meeting. To the extent that time permits the Committee Chairman may allow public presentation of oral statements at the meeting.

All communications regarding this Advisory Committee should be addressed to LTC C. F. Moore, Advisory Committee Management Officer for Office Chief of Military History, Room 2009, Tempo C, Second and R Streets SW., Washington, DC 20315.

For the Chief of Military History.

C. F. MOORE,
LTC, Infantry, Executive Officer, Plans, Programs and Administration.

MARCH 5, 1973.

[FR Doc.73-4559 Filed 3-8-73;8:45 am]

DEPARTMENT OF JUSTICE

Law Enforcement Assistance Administration

EQUAL RIGHTS GUIDELINES

Effect on Minorities and Women of Minimum Height Requirements for Employment of Law Enforcement Officers

1. *Purpose.* This guideline is issued to assist in the elimination of discrimination based on national origin, sex, and race caused by the use of restrictive minimum height requirements criteria where such requirements are unrelated to the employment performance of law enforcement personnel.

2. *Scope.* The provisions of the guideline apply to all recipients of LEAA funds. This guideline is of concern to all State Planning Agencies.

3. *Discussion.* The use of minimum height requirements as criteria for employee selection, assignment, or similar personnel action, may tend to disqualify disproportionately women and persons of certain national origins, and races. Discrimination on the ground of race, color, creed, sex, or national origin is prohibited by the Department of Justice regulations concerning employment practices of State agencies or offices receiving financial assistance extended by the Department (28 CFR Part 42, Subpart D).

4. *Requirement.* The use of minimum height requirements, which disqualifies disproportionately women and persons of certain national origins and races, such as persons of Mexican and Puerto Rican ancestry, or oriental descent, will be considered violative to this Department's regulations prohibiting employment discrimination.

5. *Exceptions.* In those instances where the recipient of Federal assistance is able to demonstrate convincingly through the use of supportive factual data such as professionally validated studies that such minimum height requirements used by the recipient is an operational necessity for designated job categories, the minimum height requirement will not be considered discriminating.

6. *Definition.* a. The term operational necessity as used in this guideline shall refer to an employment practice for which there exists an overriding legitimate operational purpose such that the practice is necessary to the safe and efficient exercise of law enforcement duties; is sufficiently compelling to override any discriminatory impact; is effectively carrying out the operational purpose it is alleged to serve; and for which there are available no acceptable alternate policies or practices which would better accomplish the operational purpose advanced, or accomplish it equally well with a lesser discriminatory impact.

b. The term law enforcement as used in this guideline is defined at section 601(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and means all activities pertaining to crime prevention or reduction and enforcement of the criminal law.

Effective date. This Guideline shall become effective on March 9, 1973.

Dated: March 6, 1973.

JERRIS LEONARD,
Administrator, Law Enforcement Assistance Administration.

CLARENCE M. COSTER,
Associate Administrator.

MARCH 5, 1973.

RICHARD W. VELDE,
Associate Administrator.

MARCH 6, 1973.

[FR Doc.73-4553 Filed 3-8-73;8:45 am]

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Michael Judge
v
City of Buffalo

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 8 day of July, 19 75 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

Leslie G. Foschio, Esq.
Corporation Counsel
City of Buffalo
1100 City Hall
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Francis X. Murphy, Esq.
914 Abbott Road, Buffalo, New York 14220

Leslie R Johnson

Sworn to before me this

8 day of July, 19 75

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77